

THE SUPREME COURT HISTORICAL SOCIETY

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Society Plans Lecture Series on the Court's Five Jewish Justices Five-Part Series Co-sponsored by Jewish Historical Society of Greater Washington

The Society is pleased to announce that plans are being finalized for a lecture series concerning the five Jewish Justices who have served on the Supreme Court. The Society will co-sponsor these five events with the Jewish Historical Society of Greater Washington. Sheldon S. Cohen, of the firm of Morgan, Lewis & Bockius is serving as ad hoc chairman of the organizing committee for the series and is assisting with planning and fundraising.

Examining the lives and careers of some of the most fascinating and memorable individuals to have served on the



Office of the Curator, Supreme Court

The Court's last Jewish Justice, Abe Fortas, will be examined in a talk by Professor Bruce Murphy, of Penn State University.

Supreme Court, the series will focus upon the careers of Louis Brandeis, Benjamin Cardozo, Felix Frankfurter, Arthur Goldberg and Abe Fortas. The subject matter of the series includes complex and rich personalities such as Louis D. Brandeis who "invented savings bank life insurance and the preferential union shop, became known as the 'People's Attorney,' and altered American jurisprudence as a lawyer and Supreme Court Justice." Another lecture will deal with Felix Frankfurter, referred to as "brilliant, rude, warmhearted, self-important, charming, brusque, talkative, but never boring. Felix Frankfurter for

over half a century remained both a protagonist of modern American liberalism and an embodiment of its ideal."

The program will consist of five separate lectures, each concerning an individual Justice. The lectures will be given by outstanding scholars who have devoted much of their careers to study of these individuals. Lectures will be given in the Supreme Court Chamber, the Restored Supreme Court Chamber in the Capitol Building and the Senate Caucus Room in the Russell Building. All three rooms have historical significance to the Court. The Court sat in what is now the Restored Supreme Court Chamber of the Capitol prior to the Civil War. The Senate Caucus Room has been the site for most of the recent confirmation hearings for Supreme Court nominees. The Supreme Court has been meeting in its current Chamber since 1935.

The tentative schedule for the lectures is as follows:

March 4, 1993

Lecture on Louis Brandeis by Prof. Melvin Urofsky. Professor Urofsky is a professor of History at Virginia Commonwealth University. His published works include *Big Steel* and *the Wilson Administration* (1969), the prize-winning *American*

--continued on page six



Office of the Curator, Supreme Court

The Court's first Jewish Justice, Louis D. Brandeis, will be the subject of a lecture by Professor Melvin Urofsky of the University of Richmond.

In Memoriam

It is with great sadness that we report the death of long-time *Quarterly* Editor and Society First Vice President, Alice Louise O'Donnell.

Miss O'Donnell's association with the Supreme Court, the Society, and the federal judicial system as a whole was a long-standing one. She served on Associate Justice Tom C. Clark's staff from 1949-1967, and before that on his staff when he was Attorney General from 1945-1949.

During her tenure with Justice Clark she completed her law degree at George Washington University in Washington, D.C. and she was admitted to the Supreme Court Bar in

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A Letter From the President



Leon Silverman

The Society's most critical funding need during the next few years is, without doubt, the Documentary History Project of the Supreme Court of the United States, 1789-1800. It is probable, in light of the Society's substantial membership growth in recent years that many of our members are unfamiliar with the Project. Since it is

the Society's single largest research endeavor, I think it appropriate to better familiarize those members who are not well informed of its history and objectives with some detail about this worthwhile program.

The Project has been under the direction of Dr. Maeva Marcus since its inception in 1977. It is co-sponsored by the Supreme Court and the Society, and our costs are underwritten by substantial annual grants from the National Historic Publications and Record Commission (NHPRC) and the William Nelson Cromwell Foundation, as well as some other occasional contributions.

The Project has published four volumes to date of an anticipated eight-volume series. I will not attempt in this column to describe them in great detail. Rather, I would refer you to a recently published review of Volume 3 from the Fall, 1992 edition of *Law and History Review*, published by the American Society for Legal History. The review provides an excellent description of the contents of Volume 3 as well as some commentary from an independent scholar, Professor R. Kent Newmyer of the University of Connecticut, attesting to the Project's value in advancing our understanding of the Court's first decade.

I expect a forthcoming issue of the *Quarterly* will include a more complete description of the published volumes and those planned for the future.

The contribution this Project has made, and will continue to make, to the legal historians who are examining, or will examine the early years of the Court's activities, is invaluable. The Society may well be proud of its role in publishing these works.

Editors' Note: The following book review, written by Prof. R. Kent Newmyer, first appeared in Law and History Review, Volume 10, Number 2, Fall 1992. The Society thanks Professor Newmyer for permitting its republication here.

Given the importance of circuit riding in the work of the early Supreme Court, it is entirely appropriate that Volume 3 of the *Documentary History of the Supreme Court* be devoted exclu-

sively to that aspect of the Court's duties. Circuit riding was provided for by the Judiciary Act of 1789, which established three circuits (composed respectively of New England, the middle states, and the southern states) and required the Justices to hold two sessions of the circuit court each year. Until 1793, two Justices were required to sit with the federal district judge in each district (state) of their assigned circuit; after that date only one justice was required. Circuit assignments varied throughout the decade, which meant that justices from northern states often had to ride the middle or the southern circuits and justices whose homes were in the South sometimes worked the middle or New England circuits.

The documents in this volume, most of which are now available for the first time, include the personal correspondence of the justices dealing with circuit duties and their charges to circuit grand juries arranged by circuit and year. Jury responses to the charges are reprinted when available as are other contemporary reactions to the charges and to the circuit judges themselves. The editors provide brief, but useful introductory essays preceding each year of the circuit, which keep the reader abreast of personnel changes on the Court, statutory changes affecting the circuits, and the shifting political scene. Appendices include several undated circuit charges of Justice Paterson, congressional legislation down to 1800 dealing with the circuits, and a circuit calendar that includes attendance information as well as the places and dates of court sessions as assigned by statute. A bibliography of works consulted and an extensive index add to the accessibility of the materials.

Several important themes emerge from these documents, the first of which is that circuit riding was demanding and frustrating work--so much so that it drove sitting justices into early retirement and worked to keep good men off the court. While it is true that occasional letters praise the beauty of the countryside, or the generosity of local hospitality, the predominant motif is one of complaint: about the condition of the roads, the weather, the absence of reasonable accommodations, and of the toll taken on family life by prolonged absences twice a year on top of the two annual sessions of the full court in Washington. The justices especially objected to circuit assignments outside their own sections and negotiated with each other to avoid them. There were structural anomalies in the system, too, the main one being that justices in Washington sat in review of cases they had tried on circuit.

Congress made some adjustments in the system over the years but, except for the short lived Judiciary Act of 1801, retained the basic form established in 1789. Apparently the lawmakers realized the fragility of national authority and the importance of circuit riding in bringing federal law directly to the people. The documents in this volume make it abundantly clear that the justices themselves understood the fact that they were the traveling representatives of a yet-to-be-legitimated national authority. Thus could Justice Ellsworth remind the grand jury empaneled in Savannah, Georgia, April 25, 1796, that [t]he national laws are the national ligatures and vehicles of life. Tho' they pervade a country as diversified in habits, as it is vast in extent, yet they give to the whole, harmony of interest, and unity of design. They are the means by which it pleases heaven to make of weak and discordant parts, one

great people; and to bestow upon them unexampled prosperity" (119).

What is even more interesting is the aristocratic gloss the justices put on their representative duties--a gloss that places them squarely within the deferential political culture of the late eighteenth century. When Justice Paterson comments on the hospitality and generosity of the "gentlemen of Charleston," (142) or when Iredell describes to his wife the "small but genteel society" the "pleasing civilities" of Portsmouth, New Hampshire (45), of being entertained by the governor of Maryland (178), we are reminded of the fact that the justices belonged to the political and social elite of their respective states. That noblesse oblige was alive and well among the Justices is suggested by their Anglicized wigs and robes. Even more to the point was the didactic, often patronizing, tone of their jury charges. The justices on circuit were in fact more directly in touch with the people than either of the political branches of the national government, and like the itinerant evangelicals of an earlier age they rarely missed a chance to teach and preach. Thus we hear Justice Paterson in his charge of April 2, 1795, to the grand jury for the district of New Jersey declare:

The best and most effectual method of preventing the commission of crimes is to render the system of education as general and perfect as possible. . . . The mind, without literature or science, is in a rude and dark state, and incapable of high or useful exertions. . . . (11). To act well our parts in society, we must know the true interest of the community in which we live; to perform in a proper manner the various duties incumbent upon us as men and as citizens, we must know what those duties are, what we owe to others, and what is due to ourselves. Knowledge lies at the foundation of social order and happiness (12).

Justices Cushing, Ellsworth, Iredell, and Chase, whose charges were if anything even more didactic and ministerial than Paterson's, likewise assumed that they were bringing light and wisdom to the benighted people. The deferential responses of juries to these charges, some of the most interesting documents in the volume, echo the elitist assumptions of the justices themselves.

Given their assumption that they were the special guardians of republican civilization and given the fact that political divisions of the 1790s increasingly turned on the belief that civilization itself was at risk, it was perhaps inevitable that the judges should get sucked into the vortex of partisan conflict. Judging from their charges they marched off with a grim and self-righteous determination and not a little paranoia to preserve law and order. The justices, Federalist appointees all, not surprisingly concluded that danger to republicanism came from the radical, Jacobinical ideas unleashed by the French Revolution-- "the whole bloody reign of Robespierre and his accomplices;" as Cushing put it in 1798 (309). The judges were equally persuaded that the Democratic-Republican party was the chief repository of those unhinging ideas. Students of the period are, of course, familiar with Justice Chase's political

attacks on the latter from the circuit bench, and his passionate Jeremiads are included in this volume. But what comes through here is how much the other justices shared his views--how all of them operated on the conservative premises of the English common law tradition.

Take for example Ellsworth's charges to the grand jury for the district of New York, April 1, 1797, in which he lashes out in pulpit rhetoric against the "hateful influence of those elements of disorganization, & tenets of impiety," the "spirit of party which poisons the source of public confidence, and palsies the hand of the administration;" and that which unleashes foreign influence, the "destroying angel of republics" (159). Justice Cushing got so heated up in Richmond, November 23, 1798, that he called on "AN ANGEL OF DELIVERANCE;" in the person of George Washington, to rescue the republic. In fact, the justice cast himself in the same heaven appointed role. Armed with true law he would rescue "liberty and property," "virtue and piety," extirpate "all combinations of foreign influence and intrigue, of internal anarchy discord, misrepresentation, calumny and falsehood, operating from POLITICAL, ambitious and selfish purposes;" and subdue "all impious attempt to root out of men's minds every trace of christian and natural religion." On his hit list were "democratic societies," the licentious press, and those (debtors who argued against paying British debts) who declared an unprovoked war upon property" and whose evil ways have caused untold suffering to "widows and orphans" across the land. Opponents of the Jay Treaty were also designated public enemies (305-6). Cushing went on in this vein so long that he prompted one wag to question how it was that "an annual speech of 60 lines from a British king has given birth to an annual speech of from 3 to 600 by an American president, 1000 from a state governor, and from 2000 to 6000 from a federal judge?" (317).

As political passions intensified after 1798--fueled by the XYZ disclosures, the Fries Rebellion, the Alien and Sedition acts, and the Virginia and Kentucky Resolutions--so did the Court's efforts in behalf of law and order, Federalist style. The charges from 1798 to 1800, for example, contain extremely valuable material concerning the doctrine of seditious libel, the federal criminal common law in general, the meaning of citizenship, and the emerging doctrine of treason.

The arrogant tone and the openly Federalist bias of the charges produced a barrage of anti-court criticism in the opposition press, a nice sampling of which is included in this volume. One critic of judicial elitism, writing in the *New York Argus*, April 11, 1797, blasted Chief Justice Ellsworth for his patronizing, preachy style and his "transatlantic prejudices" (161). Another declared that the Justices had become a band of political preachers, instead of a sage body to administer the law" (187). It is hard to disagree, and making the point so convincingly sets the stage for understanding the institutional history and jurisprudence of the Marshall period. Much has been said about the relation of law and politics under Marshall--some scholars arguing that the Chief Justice separated the two and some that he conflated them with a vengeance. Wherever the truth lies, it is clear that the starting point of any analysis must be the 1790s. The documents in this excellent volume helps immensely in that chore.

In Memoriam (continued from page one)

1964.

Miss O'Donnell joined the staff of the Federal Judicial Center in 1969 and in 1973 she became the Director of the FJC's Division of Inter-Judicial Affairs and Information Services—a position she held until her retirement in 1990.

Miss O'Donnell also played a key role in founding the Supreme Court Historical Society in 1974. Indeed, Retired Chief Justice Warren E. Burger observed at her passing:

Alice O'Donnell was a member of the small Historical Advisory Committee, which we appointed in 1970. This in turn led to the incorporation of the Society, and Alice was one of the incorporators. She has been a faithful and productive member of the Judicial Branch and will be long remembered.

In addition to being one of the Society's founding members,

Miss O'Donnell had attained Life Membership status in the Society. She was first elected as a Trustee in 1975, and was currently completing her second three year term as First Vice President. She was also Editor for the SCHS *Quarterly*.

Recounting Miss O'Donnell's devotion to her work with the Society, President Leon Silverman stated:

Alice O'Donnell was a loyal friend to the Society. Her work on our publications was of inestimable value. Her comments in Executive Committee meetings, were thoughtful and considerate. All of us on the Society's Board of Trustees will miss her for the continuing contributions she made to foster this organization's growth.

Memorial services were held for Miss O'Donnell in Washington on January 12, 1993. Her family members returned her to her native State of Washington for final services.

Membership Update

The following members have joined the Society between September 1, 1992 and December 15, 1992. Names and honorifics appear as they do on membership applications.

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Lectures (continued from page one)

Zionism from Herzl to the Holocaust (1975), *Louis D. Brandeis and the Progressive Tradition* (1981), as well as his recent book, *Felix Frankfurter: Judicial Restraint and Individual Liberties* (1991). Prof. Urofsky's lecture will take place in the Supreme Court building and will be introduced by Justice Sandra Day O'Connor.

March 18, 1993

Lecture on Felix Frankfurter by Prof. Michael Parrish of the University of California, San Diego. Prof. Parrish received his Ph.D. from Yale University. He is the author of *Securities Regulation and the New Deal* and *Felix Frankfurter and His Times: The Reform Years* (1982). Prof. Parrish's lecture will be given in the Senate Caucus Room and will be introduced by Senator George Mitchell.



Benjamin N. Cardozo, the Court's second Jewish Justice, will be the topic of a lecture by Professor Andrew Kaufman of Harvard Law School.

March 25, 1993

Lecture on Benjamin Cardozo by Prof. Andrew Kaufman of Harvard University. Prof. Kaufman is the Charles Stebbins Fairchild Professor at Harvard Law School and the author of *Commercial Law and Problems in Professional Responsibility*. Prof. Kaufman served as a law clerk to As-

sociate Justice Felix Frankfurter from 1955 to 1957. He is currently nearing completion of an exhaustive biography of Benjamin Cardozo. Senator Mitchell will introduce this lecture in the Senate Caucus Room.

April 29, 1993

Lecture on Arthur Goldberg by Emily Van Tassel of the Federal Judicial Center. Ms. Van Tassel taught at Georgetown University and worked on the staff of the Documentary History of the Supreme Court: 1789-1800. She recently presented a paper on "Homestead Exemptions and the Moral Economy of Dependency in Nineteenth Century Georgia." Lecture to be held in the restored Supreme Court Chamber of the U.S. Capitol.



Associate Justice Felix Frankfurter will be the focus of a paper to be delivered by Professor Michael Parrish of the University of California at San Diego.

May 13, 1993

Lecture on Abe Fortas by Prof. Bruce Murphy of Pennsylvania State University. Prof. Murphy is the author of the biography *Fortas: The Rise and Ruin of a Supreme Court Justice* and *The Brandeis-Frankfurter Connection*, among other works. Justice Anthony Kennedy will introduce this lecture in the Supreme Court building.

The lecture series will be introduced by Justice Sandra Day O'Connor who will present Professor Melvin Urofsky as the first speaker of the series. Other speakers

will be introduced by United States Senators Mitchell, Lieberman and Ford who have been very supportive of the program and who have been instrumental in arranging for the use of the space in the Capitol Building.

Each lecture will have limited seating available. Seating capacity for the lectures will vary according to the size of the chamber in which the lecture is given.

Reservations for all five lectures in the series are expected to cost \$60.00—which will include the cost of the receptions following each event. Reservation requests for the five-part series will be filled on a first-come, first-served basis, after which reservation requests will be confirmed for individual lecture to the extent to which seating is available. Admission to individual lectures and receptions will be \$15.00 each.

The modest cost for the series is being made possible by several generous co-sponsors to the series. To date, the sponsors for the project include: Sondra Bender, Marvin Eisenstadt, the firm of Morgan, Lewis & Bockius, and the Brandeis University Alumni.

All members of the Supreme Court Historical Society and the Jewish Historical Society of Greater Washington will receive an invitation to the series, outlining the schedule and costs involved, accompanied by a reservation form. Members are encouraged to make their reservations early, as space is limited.



Associate Justice Arthur Goldberg will be the topic of an address by Emily Van Tassel of the Federal Judicial Center.

Alfred Moore: The Court's Last North Carolinian

by James M. Buchanan

Editors' Note: In addition to Mr. Buchanan's work, we have used an excellent pamphlet entitled Namesake by Robert Mason, published by the Moore County Historical Association. Another source for the piece was The Documentary History of the Supreme Court of the United States: 1789-1800, Volume I. Photographs in this article were made available by the North Carolina Division of Archives and History.

Alfred Moore was born on May 21, 1755, in Brunswick County, North Carolina, a town in the southeastern part of the state near the coastal city of Wilmington and less than twenty miles from the mouth of the Cape Fear River. The future Justice's father, Judge Maurice Moore, had married Anne Grange and together they produced three children, Alfred, Maurice and Sarah, all of whom lived to adulthood.

The extended Moore family was among the gentry class of Carolina landowners who made their fortunes in naval stores, lumber and planting. The family's political influence matched its wealth: Alfred's great uncle, James Moore, served as governor of the province of South Carolina and his grandfather had donated 320 acres from his more than 83,000 acre holdings to create Brunswick.

Following the death of his mother and the remarriage of his father, Alfred was sent to Boston at age nine for his formal education. There, according to family lore, he caught the attention of the commander of a British garrison, who offered the thirteen year old an ensign commission. The boy turned him down.

Upon his return to North Carolina, Moore studied law under the direction of his father. By 1775 he was ready for the bar and the altar, for he was married to Susanna Elizabeth Eagles, also of Brunswick, at about the same time as his admission to practice before the state's courts.

In the same year he took up arms against the British. Along with his brother, Maurice, Moore joined the First North Carolina Regiment of the Continental Line, which was commanded by their uncle Colonel James Moore. As captain and company commander, Alfred fought in the battle of Moore's Creek Bridge and later served under his cousin, Major General Robert Howe, at the battle of Charleston.

Despite their wealth, political influence and rank in the armed forces, the Moore family paid dearly in the quest for American independence. Not long after the Moore's Creek Bridge campaign, Alfred's brother Maurice died in a skirmish. Six months later his father and uncle were killed on the same day. Moore's sister's husband, Francis Nash, took over the command from Colonel Moore and fell at the battle of Germantown.

The series of tragedies that befell the twenty-three year-old

Moore and his family prompted him to resign his commission and return to manage the family plantation, "Buchoi," on Eagles Island near Wilmington. The respite from the battlefield was short-lived, however, and Moore took command of the local militia who were busily harassing British lines around Wilmington. The British retaliated by burning his plantation buildings, carrying off his slaves, and destroying his crops. Following the British retreat from Wilmington in 1781 Moore served out the remainder of the war as a judge advocate of the North Carolina forces.

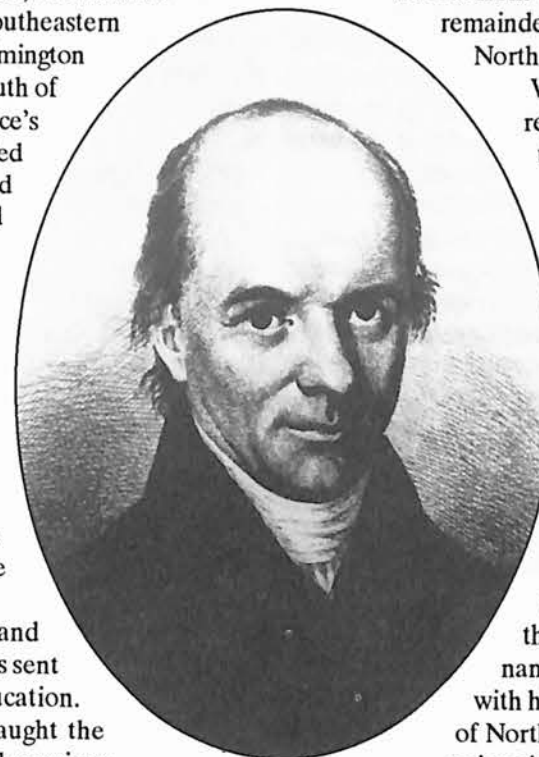
With the coming of peace, Moore's career returned to law and he soon became one of the leaders of the state's bar. During this time he also found time to represent Brunswick in the state legislature. In May 1782 the General Assembly appointed him to succeed his friend James Iredell (whom he would also succeed on the Supreme Court of the United States) as Attorney General. During his eight year tenure, Moore shaped the office and defined its function.

As the state's chief law officer, he often found himself at the bar opposite his friends Iredell and William R. Davie. Together, they constituted the best legal minds of the state during that time. In 1785 the state honored Moore, age thirty, by naming a county after him. Moore also worked with his friend Davie to establish the University of North Carolina, and served as a trustee to the university for nearly the remainder of his life.

In 1787 Moore and Iredell met headlong over the now famous case of *Bayard v. Singleton*. The case grew out of an act passed by the state legislature that required its courts to dismiss, upon petition by defendant, any claim made by Tories to land confiscated by North Carolina during the Revolution and subsequently re-sold. In 1785 a suit was brought by the daughter of Samuel Cornell, a wealthy Tory and former resident of the state who had left for England at the outbreak of the Revolution. Eight days before a confiscation bill passed the legislature, Cornell willed his daughter the land. The defendant and present owner of the land claimed title by virtue of a deed from the state superintendent of confiscated estates.

Moore moved for a dismissal under the confiscation statute while Iredell, joined by his brother-in-law Samuel Johnston, argued that the act violated the due process clause of the state constitution which guaranteed trial by jury. The court, hoping that the legislature would repeal the act, deferred action only to be answered by an enraged assembly who clamored for their heads. The legislature then began an inquiry into their near-treasonous behavior. Despite the political storm caused by the case, the judges were exonerated. Emboldened, they ruled that

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Associate Justice Alfred Moore
1800-1804

Moore (continued from previous page)

the confiscation statute was unconstitutional because every citizen had a right to a trial by jury for which the statute did not provide. The case proceeded and the plaintiffs lost before a jury who had little sympathy for the cause of Loyalists. The action of the superior court judges constituted the first act in which a court declared unconstitutional an act of legislature. As such it provided a precedent for the doctrine of judicial review adopted by the Supreme Court in its landmark *Marbury v. Madison* (1803) decision.

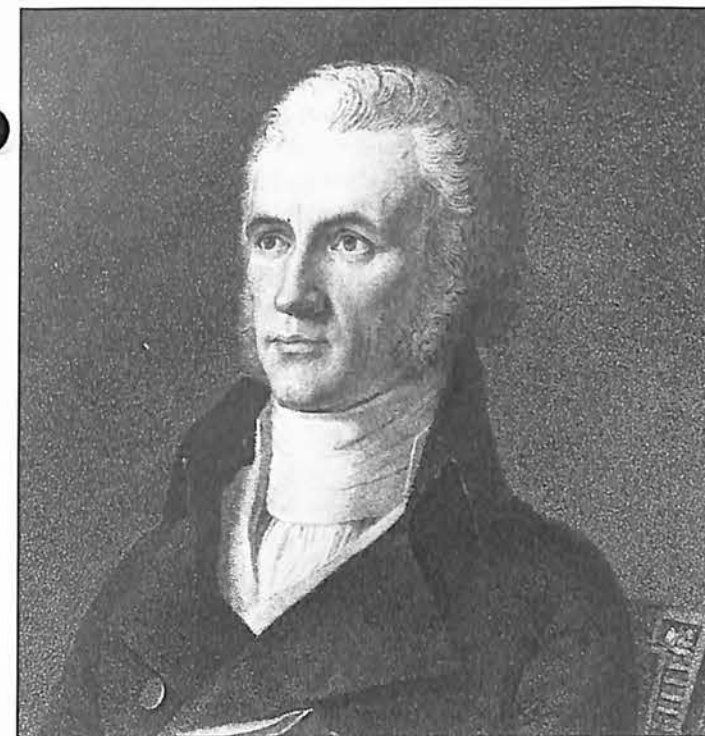
Moore's political activities were not hindered by his attorney generalship. Appointed by the legislature to represent the state at the Annapolis Convention in 1786, he stood for election to the first state ratifying convention but his federalist orientation lost him the post. Following the failure of the state to ratify the constitution, Moore again fought for a delegate's slot at the new ratifying convention. This time success was his, and joined by friends Davie and Iredell, he pushed ratification through.

Moore continued his service as attorney general until January 1791 when he resigned his post in protest of the legislature's creation of a solicitor general's office. Part of a plan conceived by the legislature to ease the burden on the existing members of the state's judicial system, Moore apparently viewed the creation of the new position as an incursion on his own powers. The legislation

created an additional district and divided the circuit duty into "East and West Ridings", adding an additional judge and the solicitor general to help compensate for the extra work. In addition, it called for the attorney general and the solicitor general to consult together and divide the duties in the ridings. It provided for the solicitor general to have "the same power, and be under the same restrictions and have the same allowances and fees of the attorney general. . . ." It is unclear why Moore objected to this plan, but he resigned as soon as John Haywood, who had been the state treasurer, became solicitor general.

In 1792 Moore returned to the state legislature and three years later made an unsuccessful bid for the U.S. Senate, losing by only one legislative vote to Democratic-Republican Timothy Bloodworth. Moore's Federalist loyalties drew the attention of President John Adams who appointed him, in January 1798, one of three commissioners to conclude a treaty with the Cherokee Nation. He withdrew from negotiations, however, before the treaty was signed, and soon began service on the North Carolina Superior Court.

Upon the death of Associate Justice James Iredell, Adams considered appointing Davie to fill the Supreme Court seat, but the North Carolinian had just been made diplomatic envoy to France. John Steele, a native of Salisbury, was serving as Comptroller of the Treasury, an appointment he had received from Washington in 1796 and which he held until 1802. Steele resolved to make a



Along with Moore, William Richardson Davie was one of the great legal figures of North Carolina during the Colonial Era. Born in England, he immigrated to North Carolina at the age of 8 and had just graduated from Princeton at the time the Revolutionary War broke out. He and Alfred Moore worked together on many occasions and collaborated in founding the University of North Carolina.

suggestion to Adams, and in a letter dated November 13, 1799, written to John Haywood, Steele asked Haywood's opinion of Moore as a possible candidate.

Can I with justice to the United States, and to individuals recommend Alfred Moore? Will he appear with reputation out of No. Carolina? I am extremely anxious that all appointments which I may have any agency in bringing about should be filled with men possessing dignity of character and talent to be useful in their public stations, and ornamental members of society. Although Mr. Moore may never know it, I have concluded to mention him to the President. I never had intercourse enough with him to be considered an acquaintance, much less a friend, w[h]ich I very much lament. His public & private character however I have always respected, and that for the present occasion is enough. Say nothing of this. You will perhaps hear more of it . . .

A newspaper article dated December 3, 1799, published in a Philadelphia paper called *Aurora*, intimated that several individuals were actively seeking the vacancy.

Although the grass has not yet had time for growing over the grave of the late judge Iredell, it is said (and believed) that Mr. Jerrey Smith of New Hampshire, Mr. Ames of Massachusetts, Mr. Bourne of Rhode-Island, Mr. Benson of New York, and Mr. Harper of Baltimore, had generously offered their services for the federal bench. . . .

After deliberation, Pres. Adams nominated Alfred Moore to the Supreme Court on December 4, 1799. Senate confirmation was obtained just six days later, but Moore did not take the oath of office until April 21, 1800, at the Circuit Court of the District of Georgia in Savannah.

Moore's five years on the Court were by all accounts unremarkable. The one opinion he did deliver caused an outburst of criticism and condemnation from Anti-federalists. The 1800 case, *Bas v. Tingy*, came at a time when partisan feelings were running at fever pitch. The Court held that a state of "limited partial" war existed between the United States and France. The decision buttressed the Federalist anti-French policy, both foreign and domestic. Democratic Republicans, already incensed over the passage and enforcement of the Alien and Sedition Acts, which were hostile to foreigners and imposed stiff penalties for criticizing the government, exploded in rage. Calls for impeachment of the entire Court appeared in Anti-federalist newspapers throughout the country.

The *Bas* case was to be Moore's only contribution to Supreme Court jurisprudence. The remainder of his career became a story of missed opportunities. He missed the biggest case, *Marbury v. Madison*, because of a delay in traveling from his circuit riding assignment on the Southern circuit. He arrived in time only to hear a final witness and did not participate in the decision.

Perhaps Moore's relative obscurity on the Court was due in part to the arrival of John Marshall as Chief Justice in 1801. In a biography of Moore written by Robert Mason, Mason quoted Hampton C. Carson's theory that "owing to the practice which prevailed after Marshall ascended to the bench of making the Chief Justice the organ of the Court," the five associate justices assumed near-anonymity." Mr. Mason went on to observe that

[t]here is good reason to believe, nevertheless, that the court under Marshall formed a solid front principally to ward off encroachments upon its authority by the President and Congress. It is especially significant that no dissenting or concurring opinion was delivered in *Marbury v. Madison*, the 1803 order in which Marshall wrote the doctrine of judicial review, although Moore had taken a contrary position in the . . . case *Bayard v. Singleton* . . .

Given what we know of Moore's strong temperament, it seems unlikely that he would have acquiesced to Marshall simply to provide a united front. It seems far more likely that Moore agreed with Marshall and therefore voted with the majority. Many accounts have been given of Marshall's persuasive personality and charm, and Moore appears to have been susceptible to him as well. Marshall and Moore were on friendly terms and from the diary of Maude Waddell, a Moore descendant, we learn that Moore's "practice was to go in his coach from North Carolina to Richmond, there meet Judge Marshall, and after a few days [at Marshall's home] proceed by coach" to Washington for the Supreme Court term. Undoubtedly the two discussed many matters during their visits in Richmond and during the carriage rides to and from Washington, allowing them time to form a friendship and to discuss opinions.

During his service on the Court, Moore remained in Washington only for the duration of the Court terms, returning home as

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Alfred Moore served as a company commander in the battle of Moore's Creek Bridge in 1776, the opening battle of the Revolutionary War in North Carolina. There the Revolutionaries defeated the Highland Tories who were loyal to the Crown. Later Moore served in the defense of Charleston, where the commanding officer was a Moore cousin, Robert Howe, North Carolina's highest ranking officer in the war.

Moore (continued from previous page)

soon as he was able. He made few acquaintances in Washington as reflected in his letter of February 1802 written to John Steele at the Treasury Department. He wrote Steele to explain that he had not yet received the quarterly draft for his salary, and to ask his assistance in obtaining it. He apologized for troubling Steele saying: "I am ashamed to be so often troublesome to you, but necessity forces me to ask assistance—I know not who else can advise me so well as yourself & moreover am acquainted with few in Washington & slightly with that few."

Moore received a letter of reply from Steele shortly thereafter in which Steele, among other matters, reported that the President was planning to renew the practice of circuit riding for Supreme Court Justices. Moore was appalled by the idea and on March 20 wrote Steele outlining his concerns:

What you intend of the plan for a new Circuit Court will prove, I fear, very different from which you wish me. Until some new Judges shall be appointed, to the southward of me, Georgia and So Carolina will of course fall to my share. Savannah is 300 miles off the shortest route, with 20 miles on a ferry; this is the post road. Augusta I believe is yet farther: to attend in Georgia therefore, will cost me 1200 miles riding each year—from here to Washington is more than 410 miles to attend the Supreme Court, therefore will cost me 1640 miles riding. Can it be believed I can ride 2800 miles a year with any regularity to attend to business on the seat of Justice—the number of cases to be determined is by no means so disturbing as the getting to them—My failing to attend at a Circuit Court will occasion the loss of that Court & this consideration gives me pain. I would under the circumstances resign my office at once and the most uncharitable conclusion would be drawn from it—that I deserted my part of the office of Judge of a federal court. . .



Moore was not only demoralized by the thought of riding circuit, but also by public opinion of the Supreme Court and its Justices. He told Steele that he found the role of being a Justice "to be one of the most uneasy in the Nation." He further commented that the Court itself was "in some respects treated like a shield & in the war of words receives abundance of the blows levelled at those who hold it up." Moore also observed that when supporters of the Court sought to defend it, it only made "their adversaries more determined to pull it down." Moore further opined that the nation would suffer from this controversy and that it would be "mischievous to the administration of Justice. Take away the confidence and respect of the People from it and the power to do good will be nearly destroyed."

Following his resignation from the Court in 1804 because of ill health, Moore returned to North Carolina to continue his

work building the university. He died six years later on October 15, 1810, at the Bladen County home of his daughter Anne and her husband Major Hugh Waddell. Judicial circuit-riding and supervising plantations had taken their toll on the fifty-five year-old former Justice. He left his property and estates to his two sons Alfred, Jr. and Maurice, and to his daughters Anne and Sarah. Still a minor, Sarah was also provided with money for her education and for "a piano and proper music books." Moore willed his library and "philosophical and nautical instruments" to Alfred, Jr., who would carry on the family name by becoming speaker of the North Carolina House of Representatives and mayor of Wilmington.

By all accounts, Moore numbered among the leaders of the North Carolina bar of his generation. A brilliant lawyer, with a profound knowledge of criminal law, he had "a keen sense of humor, a brilliant wit, a biting tongue, a masterful logic, [which] made him an adversary at the bar to be feared." His "judgment... was almost intuitive. His manner of speech was animated, and he spoke with ease and with force enlivened with flashes of wit."

Moore's biographers and contemporaries describe him as a man who appeared "so small in stature that at first glance he seemed only a child, for his height was about four feet five inches, and he was proportionately slender." One contemporary noted that "probably he weighted [sic] about 80 or 90 pounds. His head was large for his body, after the manner of dwarfs, and his face... was fine-featured good-humored and dark-eyed." His slight stature somewhat belied his strong will and quick mind.

Despite the promise of his career at the bar, his service on the bench was eclipsed by that of his brethren and, in the words of one biographer, made "scarcely a ripple in American judicial history."

John Steele (left), a native of Salisbury, was appointed as Comptroller of the U.S. Treasury by President Washington, and was reappointed by President Adams. It was Steele who recommended Moore's appointment to the Supreme Court to President Adams.

Below is "Moorefields" a home Moore purchased in Hillsborough, North Carolina. It was an eight room Georgian house which served as a second home for the Moores. The family usually arrived there in May and stayed until the first frost, seeking to avoid the outbreaks of malaria that were common during the hot months in the plantation areas.



Taking Artistic License With the Hughes Court

National Theater Dance Group Portrayed the 1936 Court as "Nine Earnest Men"

Dance and the Supreme Court may seem an unlikely combination, but on at least one occasion, the Court was the subject of a dance concert. Society member, Arthur Hodgson, was a dancer in a modern ballet which depicted the nine Justices of the Supreme Court sitting in the spring of 1936.

Mr. Hodgson was dancing with the Marian Chace-Michael Logan Dance Group. Mr. Logan choreographed the "modern

Colonists through pioneer days to the present time."

The ballet was choreographed and performed at a time when the Supreme Court was receiving great attention from the press for attacking President Roosevelt's New Deal reforms. As Joseph Rauh noted in his article, "A Personalized View of the Court-Packing Episode" (SCHS Journal-1990) "[t]he Court, in the hectic years of 1935 and 1936, invalidated Roosevelt's National



Members of the Marion Chace Dance Group of 1936 who performed a ballet on May 3rd of that year at the National Theater entitled "Nine Earnest Men." Members of the dance troupe portrayed the members of the Hughes Court of 1936.

ballet" whose premier performance was part of a program held to benefit several "farmers and their families at Harpers Ferry" who had lost their homes in a recent flood. The third segment of the program was "devoted entirely to an original and brand-new satire called 'Nine Earnest Men'." The aim of the ballet was to depict "the whole cycle of American life to date, from the

Recovery Act, Railroad Retirement Act, Bituminous Coal Conservation Act, as well as other New Deal legislation and administrative actions. . . . Talk was in the air about constitutional amendments, including expanding the Commerce Clause of the Constitution; prohibiting less than two-thirds of the Court from

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Dance Group (continued from previous page)

invalidating federal or state legislation' permitting a majority of the two houses of Congress to reenact a law invalidated by the Court without further Court review of the law; and making laws passed by two-thirds of each House unreviewable."

A newspaper article that appeared in the *Washington Sunday Star* on April 19, 1936 explained that "[w]hile the chamber has been packed during the last few months and the eyes of the world have been centered on the court as never before in its history" nine dancers "have been concentrating not upon the momentous decisions being read, but rather upon the justices themselves. Their characteristic postures, movements of their hands, their every attitude while hearing the NRA, the AAA and the TVA and other important cases during the last few months have come under the close scrutiny of the nine youthful mimes. And the result is a rare personal study of these men whose judicial supremacy cannot be challenged anywhere in the world."

The aim of the ballet in part, was to portray the justices as others saw them, but editorial comment and interpretation were clearly an essential part of the composition. "Wearing masks of the justices, so there will be no mistake about each character portrayed, they will make their entrance in long purple robes and white periwigs and present the results of their study in dance and pantomime." Perhaps ironically, the masks were made by two Public Works Administration artists, the PWA being one of Roosevelt's creations which the Court let stand.

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May 25, 1993

Personality and the Role

of a Supreme Court Justice

This section of the program will be delivered by Professor G. Edward White. Professor White is the John B. Minor Professor of Law and History at the University of Virginia. Professor White is the author of the widely acclaimed third volume of the Oliver Wendell Holmes Devise series, *History of the Supreme Court of the United States, entitled The Marshall Court and Cultural Change*, dealing with the later years of John Marshall Court (1815-1825). Professor White served as a law clerk to Chief Justice Warren from 1971-1972. Among his other published works are: *Patterns of American Legal Thought* and *The American Judicial Tradition*. Professor White will present a lecture drawing on his personal experience with and intense study of the Supreme Court.

June 1, 1993

The Judicial Selection Process: Two Opposing Views

This lecture will deal with the issues facing the Senate Judiciary Committee members in fulfilling their role to "advise and consent" the President on candidates nominated to fill Supreme Court seats. The first part of the program will be by a member of the Senate Judiciary Committee, with a commentary following by a well known scholar.

The series will be offered through the Smithsonian Institution's "Campus on the Mall" program. Society members will receive a special mailing giving pertinent information for registration. Members are encouraged to enroll soon as space will be limited and there will be great interest in the series.

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This program will attempt to explain the complexities of the process of decision-making for Justices when they formulate opinions. The featured speaker will be Allan Ides, a former law clerk to Justice Byron White, who now serves as a professor of constitutional law at Washington & Lee University Law School.

May 25, 1993 Personality and the Role of a Supreme Court Justice

This section of the program will be delivered by Professor G. Edward White. Professor White is the John B. Minor Professor of Law and History at the University of Virginia. Professor White is the author of the widely acclaimed third volume of the Oliver Wendell Holmes Devise series, *History of the Supreme Court of the United States*, entitled *The Marshall Court and Cultural Change*, dealing with the later years of John Marshall Court (1815-1825). Professor White served as a law clerk to Chief Justice Warren from 1971-1972. Among his other published works are: *Patterns of American Legal Thought* and *The American Judicial Tradition*. Professor White will present a lecture drawing on his personal experience with and intense study of the Supreme Court.

June 1, 1993 The Judicial Selection Process: Two Opposing Views

This lecture will deal with the issues facing the Senate Judiciary Committee members in fulfilling their role to "advise and consent" the President on candidates nominated to fill Supreme Court seats. The first part of the program will be by a member of the Senate Judiciary Committee, with a commentary following by a well known scholar.

The series will be offered through the Smithsonian Institution's "Campus on the Mall" program. Society members will receive a special mailing giving pertinent information for registration. Members are encouraged to enroll soon as space will be limited and there will be great interest in the series.

Justice White Hosts Annual State Membership Chairs' Dinner

Nine State Chairs Receive Awards for Outstanding Efforts

Justice and Mrs. Byron R. White hosted the 1992 dinner honoring the State Chairs of the Society's membership program held on Friday, November 20, 1992. The evening commenced with a reception in the West Conference Room during which guests had the opportunity to converse with the Whites and meet other state chairs and their guests. Dinner followed in the East Conference Room. Earlier in the day, many of the guests had taken tours of the Supreme Court building conducted by the staff of the Curator of the Court, allowing them an opportunity to see many of the fruits of the Society's labors in the form of portraits and furnishings.

Following dinner, Mr. Silverman made brief remarks thanking those in attendance for their commitment to the membership



Justice White (right) and Society President Leon Silverman (left) appear together shortly after the awards ceremony.

program of the Society, and stressing the importance of the membership to the success of the Society. He acknowledged the absence of Mr. Charles Renfrew, National Membership Chair, who was unable to attend that evening and offered Mr. Renfrew's apologies and greetings. Mr. Silverman further noted that Mr. Earl Sutherland, state chair for Alaska, had journeyed to Washington especially to be present for this dinner. He expressed his personal appreciation for Mr. Sutherland's efforts. Mr. Sutherland then received a round of applause from the other guests.

Following his prefatory remarks, Mr. Silverman introduced Justice White, and thanked him for his courtesy in hosting the party. He then called upon the Justice for a few remarks.

Justice White expressed his appreciation of the Society and its activities. He explained that when he had first come to the work



Credit for the longest distance traveled in order to attend the State Membership Chairs' Dinner went to Earl Sutherland (right), the Society's Alaska State Chair, who poses here with Justice White in his Chambers.

in the Supreme Court building, it had been sparsely furnished, with few portraits or busts to enhance the decor. Public space had little if any decoration, while even areas such as Justices' chambers had few furnishings beyond the required office furniture. Chief Justice Burger recognized this problem upon his arrival at the Supreme Court, and determined that a non-profit organization should be created to perform service to the Court and to educate the public about the Court's history and heritage. The Historical Society was created to address these needs and objectives. Justice White commented that the building now contains busts of all the past Chief Justices, as well as portraits of all previous Justices, many of which are in public space where the hundreds of thousands of annual visitors to the Court can also view them and learn about the individuals who have served on the Court. In addition, furnishings and artifacts collected by the Society have been added to enhance work space, while other artifacts have been used to furnish rooms in the building which were previously unoccupied.

Justice White further commented that he found the publications of the Society very interesting and readable, and complimented the Society on its contributions and accomplishments, and expressed his wishes for the Society's continued success. Mr. Silverman thanked Justice White for being present and for his comments and gave his assurance that the Society is committed to continue in this tradition.

Awards were then presented to those individuals present who had accomplished their membership goals for the 1991-92 campaign, noting that the awards are tangible reminders of the



Justice White points to a gift from his law clerks as Louisiana State Membership Chair Harvey Koch looks on. Following the reception and dinner, Justice White invited those in attendance for an impromptu visit to his Chambers.

Society's gratitude. The marble awards are made from polished marble that was previously part of the Supreme Court building, and affixed with the seal of the Supreme Court. Those recognized for this accomplishment were: Victor F. Battaglia of Biggs & Battaglia, State Chair for Delaware; Paul Hawkins of Freeman & Hawkins, State Chair for Georgia; George Saunders, accepting for Joan Hall, State Co-Chair for Illinois; Leon E. Eilbacher of Hunt, Suedhoff, Borror & Eilbacher, State Chair for Indiana; Harvey C. Koch of Koch & Rouse, State Chair for Louisiana; James L. Volling of Faegre & Benson, State Chair for Minnesota; Rafael Escalera Rodriguez of Lasa, Escalera & Reichard, State Chair for Puerto Rico; John T. Jessee of Woods, Rogers & Hazelgrove, the Fourth Circuit Representative; and Society Trustee Vera Brown of Houston, Texas., who serves as an At-Large member of the National Membership Committee.

At the conclusion of dinner, Mr. Silverman thanked all involved for their dedication and commitment to the Society in this important endeavor. In an unexpected departure from the plans for the evening, Justice White invited those present to tour his chambers so that they might see firsthand what working chambers are like. The Whites then graciously guided dinner guests through the chambers, answering questions from guests and sharing anecdotes about life at the Court. It was a memorable climax to the dinner and all those present left with a renewed sense of dedication and commitment to the Society and the Supreme Court of the United States.



Mrs. Vera Brown receives an award from Justice White for her outstanding work in promoting the Society in Texas.

Truman Biographer David McCullough to Deliver National Heritage Lecture on February 10th

The second National Heritage Lecture, co-sponsored by the Supreme Court Historical Society, the United States Capitol Historical Society and the White House Historical Association, has been scheduled for Wednesday, February 10, 1993, at 7:30 PM, with a reception to follow at 8:30 PM. Under the auspices of the White House Historical Association, the lecture will be presented by David McCullough, noted author.

During his career, McCullough has worked as an editor for Time, Inc. and the American Heritage Publishing Company. He has written several books, including *The Path Between the Seas*, *The Johnstown Flood* and *Mornings on Horseback*. He recently published a critically acclaimed biography of Harry Truman and many think McCullough may be a contender for a Pulitzer Prize for this outstanding biography. The title of the lecture is "To the Best of My Ability--Character and the Presidency."

The lecture has been scheduled for the Grosvenor Auditorium

of the National Geographic Society located at the intersection of 17th and M Streets, N.W. Entrance to the parking garage is on M Street. The auditorium is centrally located and has a large seating capacity, as well as underground parking available. We are grateful to the National Geographic Society for making this lovely facility available for this event.

The cost for reservations to the lecture will be \$15 per person and will include a reception following the lecture. No separate parking fee will be assessed to guests attending the program. The auditorium will accommodate 400 individuals.

Invitations will be mailed to all Society members in January, 1993. As interest in the lecture will be great, we encourage you to return your reservation card as soon as possible to insure your reservation. As the sponsoring organization, the White House Historical Association will make reservations, but Society members should feel free to call our offices if they have any questions.

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